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Attorneys for Defendant  
LATONIA SMITH

**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA, ) Case No.: **2:19-CR-00304-RFB-VCF-1**  
Plaintiff, )  
vs. ) **NOTICE OF MOTION AND**  
LATONIA SMITH, ) **MOTION**  
Defendant. ) **FOR NEW TRIAL;**  
 ) **MEMORANDUM OF POINTS AND**  
 ) **AUTHORITIES;**

) HEARING DATE: December 16, 2021  
) TIME: 10:00 am  
) HON. Richard F. Boulware, II

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1 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO  
2 ASSISTANT UNITED STATES ATTORNEY, :

3 PLEASE TAKE NOTICE that on December 16, 2021 at 10:00 am, or as  
4 soon thereafter as counsel may be heard, in the courtroom of the Honorable  
5 Richard Franklin Boulware, II, United States District Court, 333 Las Vegas  
6 Boulevard, South, Las Vegas, Nevada, 89101, Latonia Smith, Defendant in the  
7 above entitled action, by her undersigned attorneys, will, and hereby does, ask  
8 the Court to enter an Order for a New Trial,

9 This motion is based upon the attached memorandum of points and  
10 authorities, the attached Declaration of Brian A. Newman, all files and records  
11 in this case, the attached declaration of Latonia Smith, attached exhibits, and  
12 upon such evidence as the Court permits counsel to present at the hearing on  
13 this motion.

14  
15 Dated this 30<sup>TH</sup> day of November, 2021

Respectfully Submitted,

16  
17 /s/ Brian A. Newman  
18 Brian A. Newman for  
19 Law Offices of  
20 Okabe & Haushalter  
21 Attorneys for Defendant  
22 Latonia Smith  
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## MEMORANDUM OF POINTS AND AUTHORITIES

Latonia Smith's lawyers inexplicably and unjustifiably failed to move to suppress items seized without a warrant. Because the Government used the unconstitutionally seized items as the cornerstone of their prosecution of Ms. Smith, she is entitled to a new trial.

## STATEMENT OF FACTS

After postal inspectors obtained a warrant on October 29, 2019 to search of the home where Latonia Smith resided with Sylvia John and Annecer John Peruzar, law enforcement were informed that Ms. Smith traveled from Las Vegas to Reno and confronted someone with what was believed to be a handgun. Law enforcement thereupon applied "to supplement the list of items to be seized as found in the Warrant authorized on October 29, 2019" by authorizing them to search for and seize "cellular telephone devices." EXHIBIT A (Bates 884); EXHIBIT B (Bates 873).<sup>1</sup>

Having applied for the warrant, law enforcement did not wait to find out whether a neutral and detached magistrate would grant it. At 9:32 p.m. on November 1, 2019, postal inspectors invaded Ms. Smith's home and seized a replica air gun and numerous cell phones. EXHIBIT C (Bates 886). For one hour and 20 minutes, law enforcement conducted an exhaustive search of Ms. Smith's home, pulling drawers out of cabinets and throwing their contents on the floor, before finally leaving shortly before 10:52 p.m. EXHIBIT C (Bates 886). At the time of the search, no warrant had been issued authorizing the seizure of the replica air gun or cell phones.<sup>2</sup>

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<sup>1</sup> The supplemental warrant also sought authority to seize "any firearm or ammunition." EXHIBIT B (Bates 870); EXHIBIT A (Bates 884).

<sup>2</sup> The supplemental warrant was not issued until 11:32 p.m. EXHIBIT B (Bates 870).

Inexplicably, trial counsel never moved to suppress the materials seized without a warrant. Unhindered by any judicial ruling, the prosecution made extensive use of the unlawfully seized materials at trial.

## ARGUMENT

Federal Rule of Criminal Procedure grants the Court power to “vacate any judgment and grant a new trial if the interest of justice so requires.” FED. R. CRIM. P. 33(a).

A district court’s power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal.” *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000). If the court determines “that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.” *United States v. Alston*, 974 F.2d 1206, 1211-12 (9th Cir. 1992).

The Supreme Court has instructed that “if the right to counsel guaranteed by the Constitution is to serve its purpose . . . , judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.” *McMann v. Richardson*, 397 U.S. 759, 771 (1970). “The task of safeguarding the rights of criminal defendants ultimately rests with the experienced men and women who preside in our district courts.” *Alston*, 974 F.2d at 1213.

### **1. Trial Counsel Performed Deficiently by Failing to Move to Suppress the Warrantless Seizures**

To establish that counsel’s performance was deficient, a defendant need only show that “counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Although counsel generally has the “duty to bring to bear such skill and

1 knowledge as will render the trial a reliable adversarial testing process,”  
2 ultimately, the “proper measure” is “simply reasonableness under prevailing  
3 professional norms.” *Strickland*, 466 U.S. at 668.

4 It is a ““basic principle of Fourth Amendment law that searches and  
5 seizures inside a home without a warrant are presumptively unreasonable.””  
6 *Groh v. Ramirez*, 540 U.S. 551, 559 (2004), quoting *Payton v. New York*, 445  
7 U.S. 573, 586 (1980). Accord *United States v. Brown*, 563 F.3d 410, 414 (9th  
8 Cir. 2009) (“A warrantless search is unconstitutional unless the government  
9 demonstrates that it falls within certain established and well-defined exceptions  
10 to the warrant clause.”).

11 The mere existence of *a* warrant is not controlling. “A warranted search  
12 is unreasonable if it exceeds in scope or intensity the terms of the warrant.”  
13 *United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991). Accord *United*  
14 *States v. Ramirez*, 976 F.3d 946, 952 (9th Cir. 2020) (“a search or seizure  
15 pursuant to an otherwise valid warrant is unreasonable under the Fourth  
16 Amendment . . . [if] it exceeds the scope of that warrant.”).

17 The second warrant was sought precisely because the first warrant did not  
18 authorize the seizure of items resembling cell phones. Because the officers  
19 seized cell phones without the authority of a judicial warrant, their seizure was  
20 unconstitutional and should have been suppressed.

21 Trial counsel’s failure “to seek to suppress evidence based on a violation  
22 of [Ms. Smith’s] Fourth Amendment rights is beyond the pale of an objectively  
23 reasonable strategy. The application of the fundamental principles of Fourth  
24 Amendment case law to [Ms. Smith’s] situation should have been apparent to  
25 his trial counsel.” *Gentry v. Sevier*, 597 F.3d 838, 851-52 (7th Cir. 2010). The  
26 Ninth Circuit has recognized that counsel performs deficiently when there can  
27 be “no legitimate reason for [Ms. Smith’s] trial counsel not to have raised [an]  
28 obvious” suppression motion. *United States v. Liu*, 731 F.3d 982, 998 (9th Cir.

1 2013). “[F]orfeit[ing] a compelling ground for excluding evidence essential to  
2 convict his client [is] a blunder of the first magnitude.” *Owens v. United States*,  
3 387 F.3d 607, 608 (7th Cir. 2004).

4 Trial counsel’s failure to move to suppress the cell phones and replica  
5 gun was deficient.

## 6 7 **2. Trial Counsel’s Failure to Move to Suppress Was Prejudicial**

8 In this context, prejudice is established by showing that, “had the motion  
9 been filed, there was a reasonable probability that the evidence would have been  
10 suppressed, and the outcome of the trial would have been different had the  
11 evidence been suppressed.” *Lowry v. Lewis*, 21 F.3d 344, 346-47 (9th Cir.  
12 1994). Accord *Belmontes v. Brown*, 414 F.3d 1094, 1121 (9th Cir. 2005), rev’d  
13 on other grounds, *Ayers v. Belmontes*, 549 U.S. 7 (2006); *Kimmelman v.*  
14 *Morrison*, 477 U.S. 365, 375 (1986).

15 Here, the search was presumptively unconstitutional and nothing in the  
16 record detracts from the obvious conclusion that there is, at a minimum, a  
17 “reasonable probability that the evidence would have been suppressed.” *Lowry*,  
18 21 F.3d at 346-47.

19 The evidence that should have been suppressed was the centerpiece of the  
20 prosecution’s case. Two of the prosecution’s nine witnesses provided extensive  
21 evidence about the seizure of Ms. Smith’s cell phone and the contents found  
22 thereon, R.T. 4/26/21, at 155-82; R.T. 4/27/21, 8-106, highlighted in opening  
23 statement that “the key thing that came out of that search was they recovered  
24 [Ms. Smith’s] iPhone” and, from searching the phone, “they found a few more  
25 key pieces of evidence.” R.T. 4/23/21, at 49-51. And, again, during summation  
26 and closing argument, the prosecution extensively relied on evidence seized  
27 from the phone which it again characterized as “key” to its case. R.T. 4/29/21,  
28 at 53-59, 61, 84-86.

1 Because there is a reasonable probability that the cell phone evidence  
2 would have been suppressed and of a different result at trial had the cell phone  
3 evidence been suppressed, trial counsel's failure to move to suppress was  
4 prejudicial.

5 **CONCLUSION**

6 Because trial counsel's unreasonable failure to move to suppress the  
7 warrantless seizure of Ms. Smith's cell phone undermined the fairness of the  
8 proceedings, the Court should grant her a motion trial.

9  
10 Dated this 30th day of November, 2021      Respectfully Submitted,

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13 /s/ Brian Newman  
14 Brian A. Newman for  
15 Law Offices of  
16 Okabe & Haushalter  
17 Attorneys for Defendant  
18 Latonia Smith  
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**DECLARATION OF BRIAN A. NEWMAN**

I, Brian A. Newman, declare:

1. I am an attorney duly licensed and authorized to practice law by the State of California. I am admitted to practice before this Court *pro hac vice*. I am counsel for the defendant Latonia Smith. I make this declaration in support of Ms. Smith's Motion for New Trial. The facts contained in this declaration are true based on the records on file in this case, are personally known to be true, or I am informed and believe them to be true. If called as a witness, I could and would competently testify thereto.

1. The facts contained in the accompanying motion are true.

2. Attached hereto as EXHIBIT A is a true copy of the application for a search warrant, along with the supporting affidavit of Justin Steele, produced by the Government in discovery as Bates 000874 through 000884.

3. Attached hereto as EXHIBIT B is a true copy of the November 1, 2019 search warrant, along with attachments A and B, produced by the Government in discovery as Bates 000870 through 000873.

4. Attached hereto as EXHIBIT C is a true copy of the inventory of property seized pursuant to the search warrant, produced by the Government in discovery as Bates 000885 and 000886.



1           5.     The foregoing items were contained in the file produced to me by  
2  
3 predecessor counsel along with a receipt for the foregoing discovery signed on  
4 October 13, 2020, reflecting that they had been produced on October 6, 2020.  
5

6           I declare under penalty of perjury that the foregoing is true and that this  
7 declaration was executed this 30<sup>th</sup> day of November, 2021, at Torrance,  
8 California.  
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11 Brian A. Newman

12 BRIAN A. NEWMAN  
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